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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAY - 6 1993

In the Matter of
Implementation of Section 26

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The new NBA/NBC agreement specifically reserves to the League and its teams the right to distribute regular-season and playoff games on a subscription or pay-per-view basis, over pay

WGN-TV, Chicago (30 Bulls games) and WWOR-TV, Secaucus, New Jersey (10 New Jersey Nets games). Potentially other stations would be affected, as well. The NBA has submitted the superstation "tax" plan to the federal court to determine whether it violates an existing antitrust injunction against the NBA, or the antitrust laws generally.*

While it is possible that the affected NBA franchises may be able to find other (less desirable) television outlets to carry the same number of games locally, there is no question that the intent and effect of the NBA/NBC actions are to reduce the number of fans nationwide who will see these games.** These actions are merely the latest illustration of NBA Commissioner David Stern's television policy of "less is more."***

* This tax purports to wrest from clubs whose games are broadcast on superstations the "fair market value of superstation telecasts in the national cable television market." See Exh. A at 4. The NBA bases this calculation on the fees paid by the league's basic-cable licensee, Turner Network Television (TNT). However, TNT, unlike a superstation, has both cable network subscriber fees and national advertising revenues from which to pay its rights fee to the NBA. The NBA disregarded this important distinction in its Comments, as well. Id., 6.

** "[F]ocusing solely on the number of games shown may in some instances be misleading. In particular instances, it may be more informative and meaningful to consider other measurements such as the number of viewers to whom a sport's programming is made available or the number of viewers who actually watched the programming." NBA Comments at 6.

*** As noted in Tribune's opening comments (at 7), the Chicago Bulls and WGN-TV challenged the NBA action that reduced to 20 the number of NBA games a superstation could telecast in any season. The District Court enjoined enforcement of the rule, and its decision was affirmed. Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n, 754 F. Supp. 1336 (N.D. Ill. 1991), aff'd, 961 F.2d 667 (7th Cir.), cert. denied, 113 S. Ct. 409 (1992).

The NBA/NBC contract is not a public document, and thus Tribune cannot make it available to the Commission. However, pleadings filed last week by the NBA in the continuing antitrust suit challenging the NBA's anti-superstation policies spell out the NBA's new plan to eradicate superstation telecasts. A copy of one of the NBA filings, which describes the league's actions, is attached as Exhibit A.

Tribune is confident that the NBA's new anti-superstation policies will be declared unlawful as violations of the Sherman Act, like previous restraints imposed by the NBA. However, Tribune believes it is important that the Commission be made aware of this alarming development. It signals the NBA's decision to control and sharply limit the number of telecasts available to basketball fans nationwide.* In local markets, such as New York, Chicago and Atlanta, it would preclude the broadcast of NBA games on stations which, by dint of their popularity and the cable compulsory license, are retransmitted beyond their locales.**

* The new NBC contract does not increase the number of regular-season games carried by the network.

** As Tribune noted in its Reply Comments at 4-5, WPIX in New York has sought to carry New York Knicks games but has found that the games are not available separate from New York Rangers hockey games. This contradicts the NBA's point, in its Comments (at 14), that WPIX (which the NBA does not identify by name) "has decided to carry syndicated programming instead of professional basketball." In any event, under the new NBA/NBC contract, WPIX's status as a superstation may put it on the NBA's blacklist, thereby increasing the likelihood that no Knicks games will be available on free television in the nation's largest TV market.

Tribune submits that the NBA's naked attempt to limit the availability of some 70 basketball telecasts per year to cable viewers nationwide is worthy of the Commission's study, and ultimately its condemnation. Moreover, to the extent this policy of America's most financially successful sports league is premised on a limited statutory exemption to the antitrust laws, we submit the Commission should recommend to Congress that the law be clarified so as to prohibit a result so plainly injurious to consumers.

Respectfully submitted,

TRIBUNE BROADCASTING COMPANY

By 

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO PROFESSIONAL SPORTS)	
LIMITED PARTNERSHIP and)	
WGN CONTINENTAL BROADCASTING)	Case No. 90 C 6247
COMPANY,)	
)	Judge Hubert L. Will
Plaintiffs,)	Magistrate Ronald A. Guzman
)	
v.)	
)	
NATIONAL BASKETBALL)	
ASSOCIATION,)	
)	
Defendant.)	

DEFENDANT NATIONAL BASKETBALL ASSOCIATION'S
RULE 60(b) MOTION TO MODIFY THE PERMANENT INJUNCTION

Defendant National Basketball Association ("NBA") submits this motion, pursuant to Fed. R. Civ. P. 60(b)(5) and 60(b)(6), to modify the injunction contained in this Court's Order and Partial Final Judgment dated January 28, 1991 (the "Injunction"). In support of this motion, the NBA states as follows:

1. The Injunction prohibits the NBA from enforcing (i) a resolution enacted by the NBA Board of Governors on April 24, 1990, that limits member clubs from telecasting more than 20 games per season on superstations, and (ii) "any similar rule, regulation, or resolution with the effect of preventing, or attempting to prevent, plaintiff Chicago

Professional Sports Limited Partnership from broadcasting twenty-five games over plaintiff WGN Continental Broadcasting Company in any NBA season."

2. In view of the significantly changed factual and legal circumstances described below, the NBA respectfully requests, pursuant to Rules 60(b)(5) and 60(b)(6) of the Federal Rules of Civil Procedure, that the Injunction be modified to provide (i) that the NBA will not violate the Injunction by implementing the provision in the contract between NBC Sports, a division of the National Broadcasting Company ("NBC") and the NBA, dated April 27, 1993, transferring to NBC all rights in the telecasting of NBA games in the United States, which provision, as explained more fully below, has the effect of prohibiting the Chicago Bulls from

action now scheduled to begin October 12, 1993, the NBA suggests that this motion be heard at the time of trial, and decided at the same time decision is rendered on the issues raised at the trial.

4. The NBA seeks modification of the Injunction because the NBA Board of Governors, at its meeting on April 27, 1993, adopted a fundamentally different approach to regulation of superstation telecasts of NBA games:

■ The Board of Governors, by a vote of 23 yes, 3 no and one abstention, adopted a resolution that the NBA owns and controls the copyright in every NBA telecast, thereby making clear that the NBA may transfer or retain any or all rights in the telecasting of NBA games through all modes of distribution.

■ The Board of Governors, by a vote of 24 yes, 2 no and one abstention, authorized a new four-year network television agreement with NBC that, among other things (a) transfers to NBC the member teams' rights in the telecasting of all NBA games, (b) permits the NBA to authorize its teams to exercise local telecast rights, but (c) prohibits the NBA from authorizing its teams to telecast games by means of a local broadcast station whose signal is distributed to more

than five million households outside of a team's home territory.¹

■ The Board of Governors' resolution authorizing the new NBC contract provides that the new NBC contract will not be deemed effective to limit the number of games the Chicago Bulls may authorize for telecast on WGN until this Court has determined that this effect of the NBC agreement does not violate the Injunction (as it presently exists or as it may be modified). NBC has agreed to this single limitation upon the present effectiveness of the contract.

■ The Board of Governors, by a vote of 23 yes, 3 no and one not present, authorized a per-game fee, calculated pursuant to a formula specified in the Board's resolution, to

~~be imposed upon member clubs beginning in the 1994-95 season~~

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enacting the Superstation Fee provides that, while the Fee is effective beginning with the 1994-95 season, the NBA shall not take steps to collect the Superstation Fee until the issuance of an appropriate court order that the Superstation Fee does not violate the Injunction (as it presently exists or as it may be modified) and is lawful under the antitrust laws.

■ The 25-Game Rule was repealed, by a vote of 27-0, at the April 1993 Board of Governors meeting, leaving the NBA's 41-game per season limitation on all local over-the-air telecasts as the only direct numerical limitation on member club superstation telecasting -- and rendering moot and otherwise non-justiciable plaintiffs' antitrust challenge to the 25-Game Rule.


5. With regard to the new NBC contract, the NBA seeks modification of the Injunction, as necessary, so that the transfer by the NBA, as agent for its member teams, to NBC of all rights in the telecasting of NBA games in the United States (including member club rights, if any, to authorize telecasts of their games over superstations), will not violate the Injunction as it affects the Chicago Bulls. That transfer, as a joint transfer by the NBA of rights of its member clubs in the sponsored telecasting of their games, comes within the antitrust exemption provided by the Sports Broadcasting Act, 15 U.S.C. § 1291-95 ("SBA"), and is therefore immune from antitrust challenge.

stations does not violate the Injunction. This transfer of rights does not violate the Sherman Act because the NBA is a single integrated economic enterprise and, in any event, the transfer is a procompetitive business strategy, permitted under the Rule of Reason, for the effective distribution of televised NBA basketball in a highly fragmented and saturated.

member club-authorized superstation telecasts during the term of the new NBC agreement. If the requested relief as to the NBC agreement is not granted, however, the NBA will enforce the Superstation Fee if this Court determines that the Fee does not violate the Injunction (in its present form or as modified) and does not violate the antitrust laws. The Board of Governors has enacted the Superstation Fee. There are no conditions precedent to enforcement of that Fee, other than the rulings the NBA seeks upon this motion and the related Counterclaims, and accordingly the NBA's motion to modify the Injunction with respect to the Superstation Fee (as well as its Second Counterclaim, for a declaratory judgment that the Superstation Fee does not violate the antitrust laws) is fully justiciable at this time.


WHEREFORE, the NBA respectfully submits that, upon this motion and all subsequent submissions concerning this motion, upon the pleadings, and upon all of the evidence to be adduced at trial, the NBA's motion to modify the Injunction should be granted.

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